

**BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD**

**KEVIN D. EVANS**

Claimant

V.

**CESSNA AIRCRAFT CO.**

Self-Insured Respondent

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Docket No. 1,062,821

**ORDER**

On February 25, 2016, respondent filed a Motion For Stay with the Board.

**APPEARANCES**

Jeffrey K. Cooper, of Topeka, Kansas, appeared for the claimant. Travis L. Cook, of Wichita, Kansas, appeared for self-insured respondent.

**ISSUES**

Respondent appealed the Board's January 26, 2016, Order to the Kansas Court of Appeals, and now requests a stay on payment of benefits described in K.S.A. 44-556(b), pending the decision of the Kansas Court of Appeals, pursuant to *Nuessen*<sup>1</sup> and K.S.A. 77-616.

Claimant argues the motion to stay should be denied.

**FINDINGS OF FACT**

Claimant suffered injury while working for respondent on October 7, 2011. This matter was litigated and claimant was ultimately awarded a 17 percent functional impairment to the body as a whole for his bilateral shoulders and lumbar spine.

The Board affirmed the ALJ's Award of 17 percent functional impairment to the body as a whole, but reversed the award of medical benefits beyond the \$500 statutory unauthorized medical allowance for the surgery performed by John R. Dickerson, M.D.

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<sup>1</sup> *Nuessen v. Sutherlands*, 51 Kan. App. 2d 616, 352 P.3d 587 (2015).

Respondent appealed to the Kansas Court of Appeals and filed a Motion For Stay the payment of benefits with the Board on February 25, 2016, pursuant to K.S.A. 44-556 and K.S.A. 77-616, citing *Nuessen*.

**PRINCIPLES OF LAW AND ANALYSIS**

K.S.A. 77-616 states:

- (a) Unless precluded by law, the agency may grant a stay on appropriate terms or other temporary remedies during the pendency of judicial review.
- (b) A party may file a motion in the reviewing court, during the pendency of judicial review, seeking interlocutory review of the agency's action on an application for stay or other temporary remedies.
- (c) If the agency has found that its action on an application for stay or other temporary remedies is justified to protect against a substantial threat to the public health, safety or welfare, the court may not grant relief unless it finds that:
  - (1) The applicant is likely to prevail when the court finally disposes of the matter;
  - (2) without relief the applicant will suffer irreparable injury;
  - (3) the grant of relief to the applicant will not substantially harm other parties to the proceedings; and
  - (4) the threat to the public health, safety or welfare relied on by the agency is not sufficiently serious to justify the agency's action in the circumstances.
- (d) If subsection (c) does not apply, the court shall grant relief if it finds, in its independent judgment, that the agency's action on the application for stay or other temporary remedies was unreasonable in the circumstances.
- (e) If the court determines that relief should be granted from the agency's action on an application for stay or other temporary remedies, the court may remand the matter to the agency with directions to deny a stay, to grant a stay on appropriate terms or to grant other temporary remedies, or the court may issue an order denying a stay, granting a stay on appropriate terms or granting other temporary remedies. As used in this subsection, "appropriate terms" may include requirement of a bond.
- (f) Except as otherwise authorized by rule of the supreme court, the court shall not issue any ex parte order pursuant to this section.
- (g) This section shall not apply to proceedings under K.S.A. 66-118g through 66-118k, and amendments thereto.

K.S.A. 44-556(b) states:

- (b) Commencement of an action for review by the court of appeals shall not stay the payment of compensation due for the ten-week period next preceding the board's decision and for the period of time after the board's decision and prior to the decision of the court of appeals on review.

Traditionally, the Board held that K.S.A. 44-556(b) contained an automatic stay provision for the payment of benefits pending an appeal to the Kansas Court of Appeals,

except the weekly benefits provided therein. However, the Court of Appeals, in *Nuessen*, determined the Kansas Legislature, in modifying the Kansas Workers Compensation Act (Act) in 1993, intended to remove the automatic stay for workers compensation benefits, effective with the 1993 statutory revisions to the Act. As noted in *Nuessen*, the Kansas Supreme Court, in *Acosta*<sup>2</sup>, stated it:

“ ‘is the declared public policy of the state that compensation awards shall be promptly paid, and [K.S.A. 44-512a] is the means selected by the Legislature to insure their enforcement and applies to all awards and judgments without the slightest qualification.’ ”<sup>3</sup>

The Court of Appeals interpreted the Supreme Court’s reference to K.S.A. 44-512a as support for the view K.S.A. 2014 Supp. 44-556(b) does not provide for an automatic stay of workers compensation benefits while judicial review is pending, as had been previously found by the Board.<sup>4</sup>

The Board must determine whether respondent’s request for a stay should be granted. K.S.A. 77-616 does not make a stay mandatory by the agency. That determination is at the discretion of the agency involved in the litigation, as noted in the statutory language providing the “agency may grant a stay”.

Respondent contends the Board ignored medical opinions while making its determination that claimant suffered a 17 percent whole body impairment. In reviewing the decision issued by the Board, it is evident the entire record was considered. While the Board did not place as much credibility in the medical experts supporting respondent’s position, that does not mean those opinions were ignored. Rather, it simply means the Board found the opinions of Dr. Murati and Dr. Prohaska to be more persuasive in determining the functional impairment suffered by claimant from this accident.

The Board also finds that, while it can consider the issues dealing with a substantial threat to the public health, safety or welfare, the Board, in its discretion, is not required to consider those issues. K.S.A. 77-616(a) only places limitations on the Board where a stay is “precluded by law”. The only statutory preclusion against a stay is contained in K.S.A. 44-556(b).

Here, there is no compensation due during the ten-week period next preceding the Board’s decision nor during the period of time after the Board’s decision, as all compensation awarded was due and owing before the Board issued its decision and well

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<sup>2</sup> *Acosta v. National Beef Packing Co.*, 273 Kan. 385, 44 P.3d 330 (2002).

<sup>3</sup> *Id.* at 398-399.

<sup>4</sup> *Nuessen v. Sutherlands*, 51 Kan. App. 2d 616, 352 P.3d 587 (2015).

before the appeal was filed. The stay requested by respondent would only apply to any lump sum amounts due from the Award and not already paid.

The Board finds no appropriate justification to grant respondent's motion in this instance. Respondent's Motion For Stay is denied.

**CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the respondent's Motion to Stay the payment of benefits should be denied.

**AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that Respondent's Motion to Stay payment of benefits is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of April, 2016.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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Thomas Klein, Administrative Law Judge